"jocular comments" were "seized upon and their significance grossly exaggerated". I do not see anywhere in this long series of correspondence where jocular comments were justified. On the contrary, all the correspondence were conducted seriously. Mr. Smith did not identify which particular comments were jocular. I don't think any of the comments of Mr. Smith were made in a jocular vein. Probably Mr. Smith had by then realized that some of his comments or remarks have gone beyond the bounds of propriety and sought to explain them by saying they were "jocular comments". I would also stress that the comments were not made off the cuff in the heat of an exchange. They were expressed in writing and Mr. Smith obviously had time to reflect on them.

I can understand the difficulty which Mr. Smith faced: a non-lawyer who is not familiar with the statutes of Singapore. But he is an experienced arbitrator. When a point of law is raised and an arbitrator is not sure of the position, he should first hear submissions on it and *only then* make his comments and ruling. The decision should be conveyed in a tone and manner consistent with the dignity and impartiality of an arbitrator. If the arbitrator is still not sure of the legal position after hearing the parties, then obviously he can and should, through the parties, seek the assistance of the court. I am afraid in respect of both the two legal points raised by Turner/SLB – the Legal Profession Act issue and the clause 22 issue – the approach taken by Mr. Smith does give the impression of being adversarial.

I wish to emphasise that the fact that an arbitrator is alleged to have ruled in favour of one side most of the time (or as in the present case, almost all the time) is neither here nor there. But the manner in which an arbitrator goes about making each ruling is crucial. In the instant case, I would say, having regard to all the particulars of complaint indicated above, and if I may use the words of Cozen-Hardy M.R. in *Re Enoch & Zaretzky Bock & Co.*,[9] clearly in the present circumstances "it would not be satisfactory, it would not be fair, it would not be just, to leave the rights of the parties, as they necessarily would be, in (Mr. Smith's) sole hands." Mr. Smith's conduct has destroyed the confidence of at least Turner in his ability to come to a fair and just conclusion. Not only has it been *amply* established that "it might reasonably be suspected by fair-minded persons that (Mr. Smith) might not resolve the question before him with a fair and unprejudiced mind" (the words of the Australian High Court in *R.* v. *Watson*[11]), it has clearly been shown that in this case there is a real likelihood of bias.

As should be apparent from the above, I would also hold that, besides bias, there are two other separate grounds, upon which Mr. Smith's removal is warranted. These are:

(i) His having made up his mind that there were no merits in the clause 22 issue without hearing the parties: see his letter of 10 November 1987. Here, Mr. Smith has breached the rules of natural justice. This is misconduct.

(ii) His refusal to give his consent to refer the clause 22 issue to the court for a decision when he decided that he was unable to rule on it. As this issue goes to the root of Mr. Smith's jurisdiction to commence hearing, he has misconducted the proceedings by pressing ahead, when he himself said that the arguments of SLB were persuasive.

In the result, and with regret, I have to order that Mr. Smith be removed as the arbitrator. The costs of this motion shall be borne by the respondents.

Order accordingly.

Solicitors: *Shook Lin & Bok; Cooma Lau & Loh & M. Karthigesu.*

BANK NATIONALE DE PARIS v. SHIN HONG HANG ENTERPRISE PTE. LTD. & ORS.

[A.C.J. (Lai Kew Chai J.) 11 May 1988]

[Singapore – Summons-in-Chambers No. 6766 of 1987]

Civil Procedure – Appeal – Leave to appeal out of time – Application for – Application made after substantial time lapse from date of court orders – Whether special circumstances exist to justify application – R.S.C. 1970, O. 56.

The plaintiffs sought leave to appeal and leave to appeal out of time to the Court of Appeal against two orders made by the court. The application was made after a delay of about two years and five months after the first order was made and almost 11 months after the second order was made. Counsel for the plaintiffs relied on *Property and Reversionary Investment Corporation Ltd.* v. *Templar & Anor.*[2] where a landlord was granted leave to appeal to the Court of Appeal owing to the special circumstances shown, although there was a delay of about two years and seven months.

Held, dismissing the application: on the facts of the case, it is quite plain to the court that no such special circumstances exist in the present case which is miles away from *Templar's* case.

Cases referred to:

(1) *P.H. Grace Pte. Ltd. & Ors.* v. *American Express International Banking Corporation* [1987] 1 M.L.J. 437 (distd).

(2) *Property and Reversionary Investment Corporation Ltd.* v. *Templar & Anor.* [1978] 2 All E.R. 433 (distd).

SUMMONS-IN-CHAMBERS.

Joseph Yoong Tat Choy for the plaintiffs/applicants.

Teo Guan Teck for the defendants/respondents.

Cur. Adv. Vult.

Lai Kew Chai J.: By Summons-in-Chambers No. 6766 of 1987 filed as late as 6 October 1987, the plaintiffs sought leave to appeal and leave to appeal out of time to the Court of Appeal against the order I made on 16 May 1985 whereby I entered judgment against the first defendants in the sum of $47,712.80, interest and costs on a current account and whereby I ordered that the plaintiffs do stay execution against the first defendants as the principal debtors and against the second, third and fourth defendants who were sued as guarantors. By prayer 3 of the same Summons-in-Chambers No. 6766 of 1987, the plaintiffs also sought leave to appeal and leave to appeal out of time to the Court of Appeal against my decision made on 17 November 1986 whereby I allowed the decision of the Registrar, ordering a stay of execution against the second, third and fourth defendants pending the trial of the counterclaim of the first defendants, to stand. By prayer 4, the plaintiffs sought leave to appeal out of time in respect of the aforesaid two decisions I made. It will be seen that the plaintiffs' applications were made after a delay of about two years and five months after my first order was made and almost 11 months after my second decision was made. It should also be noted that the plaintiffs have not appealed against the Registrar's order of stay of execution against the second, third and fourth defendants which was made on 30 August 1985.

The plaintiffs' applications first came up before me for hearing on 9 November 1987. As the defendants were served with the affidavits only on 7 November 1987, the applications had to be adjourned to a date to be fixed after the year end vacation. The matters have come up again today for consideration.

To understand how the plaintiffs' applications arose, I need to recite the procedural history of this case. In this action, the plaintiffs as bankers claimed the sum of $47,212.80, interest and costs against the first defendants for banking facilities, including overdraft facilities. The plaintiffs also claimed against the second, third and fourth defendants as guarantors under a written guarantee dated 12 April 1984.

On 8 October 1984, the plaintiffs took out an application only against the first defendants for summary judgment. No application was made against the second, third and fourth defendants presumably because they had not been served with the writ. In an affidavit filed on behalf of the first defendants by the second defendant on 8 November 1984, it was not disputed that the first defendants had overdrawn their current account with the plaintiffs in the amount claimed, but it was alleged that the plaintiffs had agreed to grant banking facilities to the first defendants up to $500,000 as evidenced by that amount stated in the guarantee exhibited, and that pursuant to that agreement, the first defendants had in April 1984 entered into two contracts for the purchases of timber from sellers in Indonesia under which the first defendants had paid deposits totalling $128,000 and under which the first defendants had undertaken to the sellers and intended to cause the plaintiffs to issue two letters of credit to pay for the timber. The first defendants further alleged that in breach of the contract for banking facilities, the plaintiffs wrongfully refused to open the letters of credit by reason of which the said deposits were forfeited by the sellers of the timber and that consequently the first defendants had suffered damages and losses. I need not describe the terms of the contracts for the purchases of timber save to make the general observation that copies of the relevant contemporaneous documents were exhibited which plainly established that the first defendants had a *bona fide* counterclaim against the plaintiffs in a sum not less than $128,000 which obviously would overtop the plaintiffs' claim of $47,712.80.

At the conclusion of the hearing for summary judgment, the Assistant Registrar gave the first defendants conditional leave to defend which they

could do if they paid the sum claimed into court or furnished a bank guarantee within 21 days, failing which judgment would be entered against the first defendants. However, the Assistant Registrar granted a stay pending an appeal by the first defendants.

Not satisfied with this decision, the first defendants appealed. At the conclusion of the appeal before me on 16 May 1985, I set aside the decision of the Assistant Registrar and entered judgment against the first defendants as the debt was plainly due and because I saw no reason why the plaintiffs should be put to additional expenses and trouble to prove their claim in a trial. In view of the overtopping counterclaim, which on the affidavit evidence was plainly *bona fide* and substantial, I ordered a stay of execution against all the defendants. On a review of the file and on reflection, I must say that the order of stay of execution against the other defendants was unnecessary and unwarranted.

As for the claims against the second, third and fourth defendants under the guarantee, the plaintiffs took out a separate application for summary judgment on 4 February 1985. The hearing was before the Registrar on 30 August 1985 at the conclusion of which the Registrar entered judgment against the second, third and fourth defendants but he ordered a stay of execution pending the trial of the counterclaim of the first defendants.

An appeal was lodged by the second, third and fourth defendants against the decision of the Registrar. No appeal was lodged by the plaintiffs, not even against the stay of execution ordered by the Registrar. I heard the appeal on 17 November 1986. At the hearing, counsel for the plaintiffs referred to the full text of the guarantee signed by the appellants. He mentioned that the guarantee exhibited in the first defendants' affidavit filed on 8 November 1984 was not the complete text, having omitted pages 2 and 3 thereof which contained clauses 3 to 19, and that a clause of the guarantee had taken away the common law right of the second, third and fourth defendants to avail themselves, as sureties, of the counterclaim of the principal debtor. I ruled that since the plaintiffs had not filed an appeal against the stay of execution pending trial of the counterclaim as ordered by the Registrar, the plaintiffs could not be heard on this point.

So far as the appeal of the second, third and fourth defendants was concerned, I dismissed it for the same reasons which operated in the appeal of the first defendants.

To summarize, the proceedings in this action as on 17 November 1986 had reached the following stages. Judgment had been entered against all four defendants in the sum claimed. The stay of execution which I ordered on 16 May 1985 in favour of the first defendants was in force. So far as the first defendants were concerned, the order for stay of execution in their favour was not challenged because of any term in their contract with the plaintiffs. So far as the second, third and fourth defendants were concerned, the Registrar had ordered a stay of execution in their favour on 30 August 1985. That order remained in force since the plaintiffs had not lodged any appeal.

On 6 October 1987 the plaintiffs, as I had mentioned earlier, applied by summons-in-chambers for leave to appeal to the Court of Appeal and for leave to lodge the notice of appeal out of time. As can be gleaned from the affidavit filed by the plaintiffs' solicitor on 6 November 1987, what prompted the application was the decision of the Court of Appeal as reported in *P.H. Grace Pte. Ltd. & Ors.* v. *American Express International Banking Corporation.*[1] The Court of Appeal ruled that on a true and proper construction of the guarantee in that case, a stay of execution should not have been ordered in favour of the sureties who had by the terms of the contract of guarantee given up their common law right to avail themselves of any counterclaim of the principal debtors. It would appear that the professional advisers of the plaintiffs had formed the view that, similarly, the second, third and fourth defendants had by the terms of clause 11 of the guarantee in the instant case, read with the whole guarantee, given up their common law right to avail themselves of the counterclaim of the first defendants. It was therefore contended on behalf of the plaintiffs that had this clear ruling been available at the material time, this court would not have allowed the Registrar's decision ordering a stay to stand. It should be noted that I had ruled on this matter solely on the basis that the plaintiffs had not appealed against the Registrar's decision.

The plaintiffs' application is made under Order 56 of the Rules of Supreme Court 1970 and under section 34(2) of the Supreme Court of Judicature Act (Cap. 322, 1985 Ed.). Counsel for the plaintiffs drew my attention to para 59/4/4 of the 1988 *Supreme Court Practice* and after pointing out that the matter was in the discretion of the court, he

said that the factors normally taken into consideration by a court are: (1) the length of delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding; and (4) the degree of prejudice to a would-be respondent if leave is granted. He pointed out the obvious fact that this list was not exhaustive.

Counsel for the plaintiffs conceded, as he had to, that the delay was inordinately long, that the principle as applied in *Grace's* case did not apply to the first defendants, the principal debtors, and that the plaintiffs had not appealed against the order of the Registrar on 30 August 1985 granting stay of execution in favour of the second, third and fourth defendants, and that to allow leave to appeal to the Court of Appeal would have the effect of dispensing with an appeal by the plaintiffs to the High Court.

But counsel for the plaintiffs relied on *Property and Reversionary Investment Corporation Ltd.* v. *Templar & Anor.*[2] where a landlord was granted leave to appeal to the Court of Appeal owing to the special circumstances shown, although there was a delay of about two years and seven months. It has to be borne in mind that in that case Judge Fay Q.C. had on 1 November 1974 dismissed the landlord's action for increased rent under a rent review clause because steps were not timeously taken. In doing so, he had apparently followed two Court of Appeal decisions which were subsequently overruled by the House of Lords only on 23 March 1977. In June 1977, the landlord applied to the Court of Appeal for leave to appeal. The predisposing factor in that case was the unfairness of allowing the parties' rights and obligations under the lease to be governed, and continue to be governed until the new rental review, on a construction of the rent review clause which had been overruled by the House of Lords. I dare say there must have been many other similar cases involving similar rent review clauses. The other factor, which may not be of equal importance, was the landlord's undertaking that if the appeal succeeded they would not claim any increased rent in respect of any rent payable before Midsummer's Day 1978. On those special circumstances, leave was granted by the Court of Appeal.

It is quite plain to me that no such special circumstances exist in the present case which is miles away from *Templar's* case. There can be no question of granting leave to appeal so far as the first defendants are concerned. So far as the other defendants are concerned, what happened was that the plaintiffs had not lodged an appeal against the stay of execution ordered by the Registrar on 30 August 1985, and having failed to give notice to the defendants concerned, I ruled that the plaintiffs could not refer to the terms of the guarantee to say that the stay was unwarranted. The plaintiffs did not apply for leave to appeal against the Registrar's decision out of time, nor was an appeal immediately lodged against my ruling. Neither did the plaintiffs ask for further arguments. Instead the plaintiffs had taken several further steps in these proceedings. In all the circumstances, I am of the view that the plaintiffs have waived their contractual right, if any, under the guarantee to prevent the second, third and fourth defendants from availing themselves of the counterclaim of the first defendants for the procedural purposes of staying execution of the judgments entered against them. The delay in the plaintiffs' receipt of the judgment sum may be compensated by an award of interest. On the other hand, to grant leave against the second, third and fourth defendants would raise the questions whether they should be given leave to appeal against the judgments entered against them. All considered, I therefore dismissed the application with costs.

Application dismissed.

Solicitors: *Tang & Co.; Teo Guan Teck & Co.*